ARUMUGAM & 2 ORS.

v.

PUBLIC PROSECUTOR

HIGH COURT MALAYA, IPOH
TUAN KANG HWEE GEE JC
[CRIMINAL APPEAL NO. 52-4-91]
8 SEPTEMBER 1994

CRIMINAL PROCEDURE: Charge of causing grievous hurt - Penal Code s. 326 - Same transaction - Accused tried jointly but charged separately and not in furtherance of common intention - End of prosecution case - Proper questions to ask - Whether accused in each respective case had caused the injuries complained of - Grievous hurt inflicted by only one accused - All accused called to enter defence - Whether proper - Conviction - Whether to be set aside - Criminal Procedure Code s. 173(h).

EVIDENCE: Identification evidence - Evaluation - Whether based on proper principle - Accused stranger to complainant - Identification parade held 10 months after alleged commission of crime - Misidentification - Whether probable - Whether identification evidence thereof to be rejected.

The 1st appellant in case No. 74-25-85 and the 2nd and 3rd appellants in case No. 74-46-88 were charged with an offence under s. 326 Penal Code for causing grievous hurt. Both cases arose out of the same transaction and hence the cases were tried jointly. The three appellants, however, were not charged with committing the offence jointly or with common intention.

In the Sessions Court evidence was led which showed that at the material time and place, the three appellants had attacked the complainant and that during the attack, the first appellant had slashed the left palm of the complainant with a three-foot knife. There was no doubt that the injuries caused by the slash came into one of the definitions of grievous hurt defined in s. 320 of the Penal Code. The 2nd and 3rd appellants, however, were each armed with a piece of wood with which they hit the complainant's chest and back. Medical evidence nevertheless showed that the complainant's chest and back had not suffered from any injuries. The knife and the two pieces of wood had not been produced in Court.

The first appellant was known to the complainant but not the 2nd and the 3rd appellants. At an identification parade held 6 months after the incident, the complainant identified the 1st appellant and 4 months after that, at another identification parade, he identified the 2nd and 3rd appellants.

The Sessions Judge, having called the trio to enter their respective defence as charged, and having ruled that the defence of *alibi* which the appellants had pleaded had not raised a reasonable doubt, found the 1st appellant guilty under s. 326 as charged and the 2nd and 3rd appellants guilty under s. 325, since, according to the Sessions Judge, they only used wood to attack the complainant. In consequence the 1st appellant was sentenced to 18 months imprisonment and 3 strokes of whipping while the 2nd and 3rd appellants were respectively sentenced to 6 months imprisonment. The appellants appealed against the whole of this decision.

Held:

[1] The learned Judge had adequately considered all the salient points when he decided to call for the 1st appellant's defence having undertaken a more or less maximal evaluation of them. More specifically, the learned Judge was correct in accepting the 1st appellant as the assailant who used the knife on the complainant. Likewise at the close of the case for the defence, the Sessions Judge had also applied the correct principle and had seemed to have come to a sound conclusion when he ruled that the 1st appellant's story had not raised a reasonable doubt. In the circumstances there is no reason for this Court to disturb the conviction of the 1st appellant. And nor is there reason to disturb the sentence imposed, it being appropriate considering the aggressive manner in which the blow was inflicted and the injury which almost severed the complainant's palm.

[2] It was clear from the evidence of the complainant himself that the 2nd and 3rd appellants herein had only hit him with pieces of wood. It follows therefore that at the close of the case for the prosecution, the charge under s. 326 against the 2nd and 3rd appellants should not have been allowed to stand, as the grievous hurt was caused by the 1st appellant alone. On the evidence it was also clear that there was no grounds for presuming that the 2nd and 3rd appellants were acting in concert in furtherance of a prearranged plan with the 1st appellant to cause the grievous hurt by means of the knife to the complainant. For these reasons the learned Judge should have acquitted the 2nd and 3rd appellants without calling for their defence.

[3] The Sessions Judge had failed to properly assess the identification evidence before him. The evidence of identification with regard to the 2nd and 3rd appellants, in the circumstances of this case, ought to have been rejected. The identification parade was held some 10 months after the incident and therefore, one could not discount the danger of misidentification as both the 2nd and 3rd appellants were complete strangers to the complainant who, under the circumstances, could only afford a fleeting glance of them at the time of the attack.

[4] The failure on the part of the prosecution to provide evidence of the whereabouts of the weapons, though an unsatisfactory feature in the conduct of the trial, would not diminish the complainant's credibility with regard to his claim that the weapon of offence used was a knife, in view of the fact that the injuries on his left palm was absolutely consistent with a sharp cutting instrument being used. In so far as the prosecution's case is concerned, such a failure is not fatal.

[1st appellant's appeal dismissed. 2nd and 3rd appellants' appeal allowed].

Cases referred to:

PP v. James Tan [1983] 2 MLJ 173 ***(refd)***
Isa & Ors. v. PP [1956] MLJ 93 ***(refd)***
R. v. Turnbull & Ors. [1976] 3 All ER 549 ***(foll)***
Yau Heng Fang v. PP [1985] 2 CLJ 22/[1985] 2 MLJ 335 ***(foll)***
Munusamy v. PP [1987] CLJ 250/[1987] 1 MLJ 495 ***(refd)***
Abdullah Zawawi v. PP [1985] 2 CLJ 2/[1985] 2 MLJ 16 ***(refd)***
Khoo Hi Chiang v. PP And Another Appeal [1994] 2 CLJ 151/[1994] 1 MLJ 265 ***(foll)***
Illian & Anor. v. PP 1 MLJ 421 ***(foll)***
Ng Chai Kem v. PP [1994] 2 MLJ 213 ***(foll)***

Legislation referred to:

Penal Code, ss. 320, 325, 326
Criminal Procedure Code., ss. 173, 402A(1)
Evidence Act 1950, s. 114(g)
Dangerous Drugs Act 1952, s. 39(B)

For the appellants - R. Jegathesan; M/s. R.J. Esa & Co.
For the public prosecutor - Azamuddin b. Abdul Aziz, DPP

JUDGMENT

Kang Hwee Gee JC:

The 1st appellant in case No. 74-25-85 and the 2nd and 3rd appellants in case No. 74-46-88 were charged in the Sessions Court, Ipoh with the offence of causing grievous hurt under s. 326 of the Penal Code. As both the cases arose from the same transaction respecting the same complainant they were tried jointly.

The brief facts of the two cases may be summarised as follows:

The complainant Balbir Singh was travelling in a van being driven by another person Shimar Singh along a road in Tanjong Rambutan on 9 February 1986 at about 7.30 p.m. They were on their way home from work. On reaching a stretch facing a football field in front of house No. 111 North Ward, they heard the crashing sound of a stone being thrown onto the rear portion of their van. They stopped to investigate. On alighting from the van the complainant was attacked by the 1st appellant with a knife described by the complainant to measure about three feet long and two inches wide. The knife sliced the left palm of the complainant almost severing it when he tried to block a blow from the 1st appellant. It also caused fractures to the distal part of the carpal bones. The 2nd and 3rd appellants joined in the attack on the complainant. They were each armed with a piece of wood. The 2nd appellant hit the complainant on his chest while the 3rd appellant hit him on his back. All the appellants then escaped from the scene.

The case against the appellants rested solely on the evidence of the complainant as the only witness of the incident. The other person Shamir Singh, the driver of the van could not be traced.

The 1st appellant was arrested only some 5 months later at a coffee shop in Chemor after the complainant spotted him there and informed police of his presence there. The 2nd and 3rd appellants were arrested some 10 months later. The complainant identified the 1st appellant and the 2nd and 3rd appellants at two separate identification parades conducted subsequently after the respective arrest.

It was clear from the evidence of the Senior Medical Officer Dr. Manjit Singh (PW1) that apart from the deep incised wound the complainant sustained fractures on his left palm which therefore brings the injury within the 6th designation of "grievous hurt" under s. 320 of the Penal Code. It was also clear that no other injuries were found on the complainant although he claimed to have been hit on his chest by the 2nd appellant and on the back by the 3rd appellant.

A cautioned statement was recorded from the 1st appellant and although exculpatory was admitted into evidence at the instance of the defence in the course of the prosecution's case. In the statement the 1st appellant denied being involved in the attack but admitted knowing the complainant before the incident as they were staying in the same kampong.

At the close of the prosecution's case all the three appellants were called to enter their defence as charged. The appellants put up a defence of *alibi*, the requisite notice under s. 402A(1) of the CPC having been duly served earlier on the prosecution by the respective appellant. The learned Sessions Judge considered their evidence of alibi but found that they did not raise a reasonable doubt and accordingly rejected them. He found

the 1st appellant guilty under s. 326 as charged. The 2nd and 3rd appellants however were found guilty under s. 325 of the Penal Code, since according to him, they only used wood to attack the complainant. The 1st appellant was sentenced to 18 months imprisonment and 3 strokes of whipping. The 2nd and 3rd appellant were respectively sentenced to 6 months imprisonment.

The appeals by the appellants were against both conviction and sentence.

A number of grounds were filed in their petition of appeal but before me defence Counsel confined his appeal only to the following issues:

1. The identification parades were conducted 6 months in the case of the 1st appellant and 10 months in the case of the 2nd and 3rd accused, after the alleged incident and could not therefore be relied on.
2. The prosecution failed to call 2 important witnesses *viz*, Shimar Singh and Rajendran the person who was arrested together with the 2nd and 3rd appellants. Neither did the prosecution made available or offered any of them to the defence. Accordingly, an adverse inference under s. 114(g) of the Evidence Act 1950 should be drawn against the prosecution.
3. The weapons *viz.* the knife and the 2 pieces of wood used on the complainant were not produced in Court. No reason was given for their non-production.
4. There was hostility between the complainant and the 1st appellant which the complainant himself had admitted arose from a previous encounter in which the 1st appellant had challenged the complainant to a fight. The Sessions Court Judge failed to take this into account in his judgment.
5. The alibi of the appellants should have been accepted as they had each successfully raised a reasonable doubt of their presence at the place of incidence.

Before proceeding any further it may be appropriate at this stage for me to first consider the case against the 2nd and 3rd appellants in respect of the charge they faced in case No. 74-46-88 the finding of which should in my view dispose of their case without having to consider the grounds raised by Counsel.

To get the perspective right it is pertinent to note that the 2nd and 3rd appellants in case No. 74-56-88 faced (between them jointly and with common intention) a charge of causing grievous hurt to the complainant which was separate and independent from the charge faced by the 1st appellant in case No. 74-25-86. They were not charged with committing the offence jointly and with common intention with the 1st appellant although the two cases were tried jointly.

Under s. 173(h) of the Criminal Procedure Code, it is the duty of the trial Court at the close of the case for the prosecution to consider "whether there are grounds for presuming that the accused has committed the offence charged or some other offence which the Court is competent to try, and which in its opinion it ought to try". If there are such grounds then "it shall consider the charge recorded against the accused and decide whether it is sufficient and, if necessary, shall amend same " (see *PP v. James Tan* [1983] 2 MLJ 173).

The first question that the learned Sessions Court Judge ought to have considered was therefore, whether the appellants in each respective case "has committed the offence charged" i.e. caused the injuries complained of. It was clear from the evidence of the

complainant himself that the 1st appellant struck him with a long knife. The 2nd and 3rd appellants only hit him with pieces of wood. If follows therefore at the close of the case for the prosecution that the charge under s. 326 of the Penal Code against the 2nd and 3rd appellant should not have been allowed to stand, as the grievous hurt was caused by the 1st appellant alone.

The next question he had to consider was whether "there are grounds for presuming that the accused has committed some other offence." In the context of the present case this would mean having to consider whether there was sufficient evidence to implicate the 2nd and 3rd appellants with the 1st appellant jointly and with the common intention of causing the grievous hurt to the complainant, and if necessary to amend the charges accordingly. The learned Judge did not appear to have applied the provision of s. 173(h), but it was clear there were no grounds for presuming that the 2nd and 3rd appellants were acting in concert in furtherance of a prearranged plan with the 1st appellant to cause the grievous hurt by means of the knife to the complainant. The mere fact that the 1st appellant had used the knife on the complainant would not be sufficient inference that the 2nd and 3rd appellants had intended to do the same along with him (see *Isa & Ors. v. PP* [1956] MLJ 93).

For the reasons stated it was clear at the close of the case for the prosecution the learned Judge should have acquitted the 2nd and 3rd appellants without calling for their defence. I would therefore allow the 2nd and 3rd appellants' appeal on conviction and sentence.

Having disposed of the case against the 2nd and 3rd appellants I need now only consider the grounds raised in this appeal in respect of the 1st appellant. For convenience I propose to deal with them in the following subheadings:

Identification of the appellants

To safeguard against the danger of misidentification the English Court of Appeal in *R. v. Turnbull & Ors.* [1976] 3 All ER 549 formulated guidelines to be observed by trial Judges, which in short stressed on the need for quality in identification evidence and the duty to warn the jury of any weaknesses which had appeared in such evidence. In *Yau Heng Fang v. PP* [1985] 2 MLJ 335, the Supreme Court in following the guidelines in *Turnbull* rejected the evidence of two eye witnesses who claimed to have seen the deceased being stabbed by the appellant. Visibility was poor at the time of incident and there were material contradictions in their evidence. It was held that in view of the poor opportunity to recognise the appellant coupled with their poor quality as identity witnesses, their testimonies were "inherently incredible".

Had the learned Judge applied the same standard as in *Yau Heng Fang (supra)* he would have to reject the evidence of identification with regard to the 2nd and 3rd appellants. The identification parade was conducted some 10 months after the incident. One could not therefore discount the danger of misidentification as they were complete stangers to the complainant who could under the circumstances only afford a fleeting glance of them at the time of the attack.

In the case of the 1st appellant however, the identification parade was superfluous, since the 1st appellant was known to the complainant before, a fact also admitted by the appellant in his cautioned statement. In fact the police arrested the 1st appellant only after being alerted of the 1st appellant's presence at the coffee shop by the complainant. The case against the 1st appellant therefore did not rest on the ability of the complainant

to identify the 1st appellant at the identification parade but strictly on his credibility in accusing the 1st appellant as his assailant. The incident took place when it was still bright and the complainant could see the 1st appellant clearly. The fact that the 1st appellant was arrested and identified only some 5 months later would not be a factor to consider since he was known to the complainant. The learned Judge was therefore correct in accepting the complainant's identification of the 1st appellant as the assailant who used the knife on him.

Failure to call Shimar Singh and Rajendran

An adverse inference could only be invoked against the prosecution if "there is withholding or suppression of evidence" (see *Munusamy v. PP* [1987] 1 MLJ 495). The only reason why Shimar Singh was not called was because he could not be traced after the incident. This had been explained by the investigating officer Inspector Ramli (PW11). In the case of Rajendran it was clear from the evidence of Sgt. Mat Nusi (PW12) the second investigation officer in this case that although Rajendran was arrested together with the 2nd and 3rd appellants he was not identified by the complaint as the assailant in the identification parade that was conducted subsequently, and although a statement was recorded from Rajendran, he could not now be traced. I would therefore agree with the Sessions Court Judge that no adverse inference under s. 114(g) of the Evidence Act 1950 should be drawn against the prosecution under the circumstances.

I note from his judgement that the learned Judge went a step further to consider whether by not calling the two witnesses a gap had been opened in the prosecution's case, the consequence of which would cause the prosecution to fall short of proving their case beyond reasonable doubt within the principle in *Abdullah Zawawi v. PP* [1985] 2 MLJ 16. He had rightly decided that no such gap was created although he gave no reason for it. But if a reason is required, it was clear that there could not be any gap as the complainant's evidence only implicate the three appellants leaving no room for any doubt that any other persons were involved in the attack.

Failure to produce the weapons of offence

The prosecution it would appear from the notes of evidence did not examine the investigating officer whether the knife and the pieces of wood allegedly used on the complainant were recovered at the scene. Neither did defence Counsel cross-examined him on this point. But as the complainant did not say that the weapons of offence were discarded at the scene, in the absence of any evidence to the contrary it must therefore be presumed that the assailants had taken them away with them. Undoubtedly, this failure on the part of the prosecution to provide evidence of the whereabouts of the weapons must remain one of the unsatisfactory features in the conduct of the trial. But their non-production would not in my view diminish the complainant's credibility with regard to his claim that the weapon of offence used was a knife in view of the fact that the injuries on his left palm was absolutely consistent with a sharp cutting instrument being used.

Animosity between the complainant and the 1st appellant

It would appear from the notes of evidence the complainant in cross-examination did say that the 1st appellant had challenged him to a fight before, although it was not clear when and where this was made. But the complainant denied he bore a grudge against the 1st complainant. The 1st appellant himself in his cautioned statement denied there was animosity between them. It was not surprising therefore that the learned Judge

chose to ignore the question of animosity as the probable motive for the appellant to accuse the 1st appellant. Even assuming such animosity did exist, there was no plausible reason for the complainant to deceitfully substitute the 1st appellant as his assailant in place of the actual person who attacked him.

Clearly on the evidence presented there were enough materials in the prosecution's case to call for the 1st appellant's defence on the charge. In my view the learned Judge in his grounds had adequately considered all salient points when he decided to call for the 1st appellant's defence having undertaken a more or less maximal evaluation of them as prescribed in the recent case of *Khoo Hi Chiang v. PP and Another Appeal* [1994] 1 MLJ 265.

His next duty at the close of the case for the defence was to consider the *alibi* raised by the 1st appellant on a balance of probabilities as envisaged in *Illian & Anor. v. PP* 1 MLJ 421 the principle of which it would appear, he had correctly appreciated and applied.

The 1st appellant had claimed that he was not at the scene at the time of occurrence, although he was in the vicinity together with his friend Rajendran (allegedly the same person whom the defence complained was not called by the prosecution to give evidence). They were in fact on their way to confront the complainant whom Rajendran had accused of having damaged his motor cycle earlier, when they noticed a group of people quarrelling at the place where the complainant alleged he was attacked. They aborted their plan and returned home instead.

The learned Judge found that the 1st appellant's story did not raise a reasonable doubt mainly because he was positively identified by the complainant whom he believed was telling the truth.

An appellate Court would not disturb a finding of fact by the trial Judge which had the advantage of hearing and observing the demeanour of the respective witnesses in arriving at his decision. This well known principle is reaffirmed by the Supreme Court in the recent case of *Ng Chai Kem v. PP* [1994] 2 MLJ 213 (a case under s. 39B of the Dangerous Drugs Act 1952) where Wan Yahya SCJ delivering the judgement of the Court held *obiter* that:

> The factual decision given by a Judge relying on the credit of witnesses who have been heard and seen by the Judge himself/herself, should not be changed by the appellate Court. Although the appellate Court might have come to a different decision based on the written evidence, the appellate Court could only come to a different decision if the advantage available to the trial Judge was not enough to explain or justify his decision.

I see no reason to disturb the conviction of the 1st appellant in this case. Nor would I disturb the sentence of 18 months and 3 strokes imposed as I consider it appropriate under the circumstances considering the aggressive manner in which the blow was inflicted and the resulting injury which almost severed the complainant's palm. The 1st appellant's appeal against conviction and sentence is dismissed.